Supreme Court, U.S.
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Supreme Court of the United States

RICARDO GLOVER,

Petitioner,

v.

GARY McCAUGHTRY, WARDEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

RICARDO GLOVER
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QUESTIONS PRESENTED

1. Whether the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of 28 U.S.C. § 2244 (b), where a subject- matter jurisdictional claim on an original 28 U.S.C. § 2254 appeal was misinterpreted or not interpreted by the courts of appeals.

2. Whether there can be a finality of a judgment of conviction rendered against a criminal defendant, where the criminal court lacked subject-matter jurisdiction to render the judgment of conviction against the criminal defendant.

3. Whether 28 U.S.C. § 2244 (b) restricts Courts of appeals' power or authority from revisiting their earlier decisions in a 28 U.S.C. § 2254 case and recalling the mandate thereof, where subject-matter jurisdictional claims were decided erroneously on the original appeal.

4. Whether this Court should liberally construe the present petition as a request under *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965), and grant relief accordingly, where Ricardo Glover stands alone in not receiving relief from a void judgment of conviction.

5. Whether this present petition should be liberally construe by this Court as a petition for a writs of mandamus and remanded to the Seventh Circuit with directions, or as an original request for a writ of habeas corpus.

6. Whether this Court should rescind all its previous orders denying reviews and issue Ricardo Glover a Writ of Habeas Corpus in the interest of justice, because extraordinary circumstances exists for his immediate release from a void judgment.

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All parties appear in the caption of the case on the cover page.

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No.

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GARY McCAUGHTRY, WARDEN,

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PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

Petitioner Ricardo Glover, a layman (*pro se*) litigant, prays that a writ of certiorari issue to review the Order of the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") below, because the order is in conflict with the fundamental and threshold principles of subject-matter jurisdictional law as interpreted by other federal courts' of appeals, state courts' and this Court's decisions as well.

This case presents questions of fundamental and threshold importance to our criminal and habeas corpus system: what federal courts of appeals must do when they learn after rendering their decisions in a 28 U.S.C. § 2254 habeas corpus appeal and issuing the mandate thereof that they misinterpreted or made no interpretation at all regarding the scheme to a subject-matter jurisdictional claims in an original appeal, that relief should have been granted to the petitioner, instead of denied, because the state court lacked subject-matter jurisdiction to condemn and enter a judgment against the defendant [petitioner]. In this case, the Seventh Circuit was confronted with this situation, instead of revisiting its earlier decision to determine whether it had been rendered erroneously, despite the fact that subject-matter jurisdiction is a fundamental and threshold matter that is not limited by statutory requirements for re-opening the appeal, laches does not apply even if a party had been dilatory or lackadaisical in their efforts to overturn a void judgment, or a void judgment cannot be validated by consent, ratification, waiver, or estoppel. In so concluding, the Seventh Circuit explicitly rejected the approach of other federal courts of appeals and courts, which have recalled their mandates and vacated their decisions.

The Seventh Circuit has stated in another decision that 28 U.S.C. § 2244(b) restricts it from revisiting a 28 U.S.C. § 2254 case and any relief must come from the "Supreme Court." *See Lambert v. Buss*, 489 F.3d 779, 781 (7th Cir. 2007) (Ripple, J., concurrence). In this case, it was the error of the Seventh Circuit for failing to interpret and apply the

subject-matter jurisdictional statutory and constitutional scheme for a trial court to acquire jurisdiction over criminal subject-matter and the person.

In this case below, a "Petition For The Court To Rescind Its' Original Order And Recall The Mandate Thereof Denying Habeas § 2254 Appeal Base On Extraordinary Circumstances And In The Interest Of Justice" was filed in the Seventh Circuit, since the Seventh Circuit made no statutory interpretation on the fundamental and threshold principles of subject-matter jurisdictional law in an original 28 U.S.C. § 2254 appeal regarding a petitioner's subject-matter jurisdictional claims (the scheme thereof), the petitioner asked the Seventh Circuit to revisit it's original 28 U.S.C. § 2254 decision and correct it.

The rule is regarding original subject-matter jurisdiction, that the criminal circuit court (trial court) lacked subject-matter jurisdiction at the outset in the absence of a sufficient formal accusation or the accusatory instrument itself (indictment, information or complaint), a criminal circuit court (trial court) acquires no jurisdiction whatsoever, and if it assumes jurisdiction, a trial and conviction are a nullity. The complaint is the jurisdictional instrument of a court. If the complaint is not properly filed, the convictions are void ab initio for want of subject matter jurisdiction, as the jurisdiction of the court was never invoked. A party is not barred from raising the issue at this stage in the proceedings, as subject matter jurisdiction cannot be waived, and since, of those eligible to have the judgments dismissed against them because a court

lacked subject-matter jurisdiction to render the judgment against those, *see e.g. State v. Sharp*, 2009 Ohio 1854, 2009 Ohio App. LEXIS 1561 (Ohio App. 2009).

Mr. Glover stands alone in not receiving relief, dismissal of his conviction because the state court that entered the judgment of conviction against him lacked subject-matter jurisdiction to do so, "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of" 28 U.S.C. § 2244(b). *See Gondeck v. Pan American Would Airways, Inc.*, 382 U.S. 25, 26-27 (1965) (*quoting United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)).

The Supreme Court's intervention is necessary to resolve this clear split in the federal courts of appeals. In addition, where the judgment the petitioner is imprisoned and confined thereunder is void for want of jurisdiction by the state court that rendered it, because it lacked subject-matter jurisdiction, a manifest injustice has occurred and the petitioner is actually innocent.

ORDERS AND OPINIONS BELOW

The Seventh Circuit's order is unreported and is reprinted in the appendix as Appendix A,* *see* (Pet.

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*Please note for reference of "Appendices," Appendix-A through Appendix-D, pages 1a through 114a are contained in the "Separate Appendix To Petition For Writ Of Certiorari" that accompanies this petition.

App. 1a). The original decision of the Seventh Circuit denying Mr. Glover's original 28 U.S.C. § 2254 appeal is unreported and is reprinted set forth in the appendix at (Pet. App. 98a-111a).

JURISDICTION

The Seventh Circuit issued its order on August 23, 2010. *See* (Pet. App. 1a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 1 of the Fourteenth Amendment to the United States Constitution, which is set forth at (Pet. App. 114a).

The Fourteenth Amendment is enforced by its codifications, Wisconsin Statutes Sections, which provides:

Wisconsin Chapter 753.03, Circuit Court, Wis. § 753.03 – *Jurisdiction of circuit courts*, which is set forth at (Pet. App. 48a).

Wisconsin Chapter 968, Commencement Of Criminal Proceedings, Wis. § 968.01(2) – *Complaint*; and Wis. § 968.04(1)(a) – *Warrant or summons on complaint*, which is set forth at (Pet. App. 49a).

Wisconsin Chapter 969, Bail And Other Conditions Of Release, Wis. § 969.02(1) – *Release of defendants charged with misdemeanors*; and Wis. § 969.03(1) – *Release of defendants charged with felonies*, which is set forth at (Pet. App. 50a).

Wisconsin Chapter 970 Criminal Procedure – Preliminary Proceedings, Wis. § 970.01(2) – *Initial appearance before a judge*; and Wis. § 970.02(1)(a) – *Duty of a judge at the initial appearance*, which is set forth at (Pet. App. 51a).

Article VII, Section 8 of the Wisconsin Constitution – *Circuit court: jurisdiction*, which is set forth at (Pet. App. 48a).

This case involves Title 28, Section 2244(b) of the United States Code – *Finality of determination*, which is set forth at (Pet. App. 114a).

This case involves Title 28, Section 2254 of the United States Code – *State custody; Remedies in Federal courts*, which is set forth at (Pet. App. 114a).

STATEMENT OF THE CASE

A. *Statement Of The Underlying Facts Surrounding No Provision Of The Constitution Or*

Statute, Or Both, Gave The State Criminal Circuit Court Jurisdictional Power To Adjudicate At The Outset, [Initial Appearance], To Condemn And Enter A Judgment Against Ricardo Glover.

In this case, Ricardo Glover had committed no crime; no one was sexually assaulted, hurt or killed by him. In addition, prior to this present case (the conviction, sentence and judgment of conviction) Mr. Glover had no felony conviction (not one); he had a good job, he worked everyday; he paid his taxes, he paid his bills and supported himself.

The facts of this case are not in dispute; they have been taken directly from the record and contained in the petition submitted to the Seventh Circuit, which is appended to this petition as Appendix-B (Pet. App. 29a-44a, 89a-97a), respectfully incorporated by reference herein. In addition, no court has ever concluded that the state criminal circuit court had subject-matter jurisdiction to adjudicate the case against Mr. Glover at the outset [initial appearance], to condemn him and enter a judgment of conviction against him.

A short statement of the underlying facts is submitted. On May 30, 1989, the Racine District Attorney's Office (prosecutor) forcefully brought Mr. Glover before a criminal circuit court for an initial appearance in chains and shackles from his warrantless arrest and detention by police pursuant to the Fourteenth Amendment's due process clause and equal protection clause, and the Fourteenth Amendment's codifications, Wis. § § 968.04(1)(a) and

970.01(2) in conjunction with Wis. § 970.02(1)(a), to: a) invoke the criminal circuit court's subject-matter jurisdictional power to adjudicate a criminal case (charge or charges) filed against Mr. Glover therein the prosecutor's written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)); b) to invoke the criminal circuit court's personal jurisdictional power over the person of Mr. Glover from her written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)); c) for the criminal circuit court to make a constitutional judicial determination does probable cause exist from the her written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)) for Mr. Glover warrantless arrest and detention; and, d) for the criminal circuit court to set bail on Mr. Glover from the charge or charges filed against him therein her written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)).

However, here at the outset [initial appearance of May 30, 1989] of this case, *see* (Pet. App. 57a-65a) contrary to the Fourteenth Amendment's due process of law and equal protection of the law, and it's codification, Wis. § § 968.04(1)(a), and Wis. § 970.01(2) in conjunction with 970.02(1)(a), the prosecutor did not filed[1] her timely and written

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[1] In addition, the prosecutor, an officer of the court stated to the criminal circuit court without filing her timely and written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)) against Mr. Glover, stated that he "raped" S.B, *see* (Pet. App. 57a-65a). This was intentional misconduct on the part of the prosecuting attorney because she knew that Dr. Brown's report stated that S.B. was not raped

mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)) against Mr. Glover charging him with a crime in accordance with the prescribed time limitation period of Wis. § § 968.04(1)(a) (Mr. Glover was arrested without a warrant on May 29, 1989 and is in police custody, no warrant *shall* be issued for him and the complaint charging him with an offense *shall* be filed now or at his initial appearance on the criminal circuit court by the prosecutor) and 970.01(2) (Mr. Glover was arrested without a warrant and today, May 30, 1989 he is brought before the initial appearance hearing court, the complaint *shall* be filed on the initial appearance hearing court against him now) in conjunction with Wis. § 970.02(1)(a) (at this initial appearance hearing the court *shall* inform Mr. Glover of the charge against him and *shall* furnish him with a copy of the complaint which *shall* contain the possible penalties for the offenses set forth therein. In the case he is charged with a felony, the judge *shall* also inform him of the penalties for that felony which he is charged) to invoke the criminal circuit court's subject-matter jurisdictional power and personal jurisdictional power to adjudicate at the outset pursuant to Article VII, Section 8 of the Wisconsin Constitution and Wis. § 753.03 in this case. *See* (Pet. App. 57a-65a).

The Wisconsin Legislature made no provision therein Wis. § § § 968.04(1)(a), 970.01(2) or 970.02(1)(a), giving the criminal circuit court the

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and "*injury free*," *see* (Pet. App. 52a-53a) and Officer Cros' reported stated "*that intercourse did not occur*," *see* (Pet. App. 55a, -66a-70a).

power to allow the prosecutor time to extend the filing of her written mandatory and jurisdictional accusatory instrument ("complaint," Wis. 968.01(2)) after Mr. Glover's initial appearance to invoke its subject-matter jurisdiction. *Id.*

Mr. Glover's constitutional rights to due process of law, equal protection of the law, fundamental fairness and non-deprivation of his liberty pursuant to the Fourteenth Amendment and his statutory rights, which are codifications of the Fourteenth Amendment, Wis. § § § 968.04(1)(a), 970.01(2) and 970.02(1)(a), were violated, when the criminal circuit court failed to dismiss the case against him for lack of subject-matter jurisdiction and personal jurisdiction, adjudicating on unlawful "hypothetical jurisdiction," and setting an unconstitutional and unlawful bail on him of Ten Thousand Dollars, ($10,000.00), holding him for the nonexistent offense of "further investigation." *Id.*

Here, at the outset [initial appearance], the accusatory instrument (complaint) was not filed on the criminal circuit court in accordance with the prescribed time limitation period, the conviction and judgment thereof is void ab initio for want of subject matter jurisdiction, as the jurisdiction of the criminal circuit court was never invoked, as subject matter jurisdiction cannot be waived. In addition, when the prosecutor failed to file her written mandatory and jurisdictional accusatory instrument (complaint) against Mr. Glover at the outset of the criminal case [initial appearance], *see* (Pet. App. 57a-65a), and the prosecutor failed to clear a jurisdictional hurdle which can never be harmless or waived by a court.

The criminal circuit court lacked subject-matter jurisdictional power to adjudicate at the outset [initial appearance] pursuant to Article VII, Section 8 of the Wisconsin Constitution and Wis. § 753.03, because the written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)) was not filed on it by the prosecutor in accordance with the prescribed time limitation period of Wis. § § 968.04(1)(a) (Mr. Glover was arrested without a warrant on May 29, 1989 and is in police custody, no warrant *shall* be issued for him and the complaint charging him with an offense *shall* be filed now or at his initial appearance on the criminal circuit court by the prosecutor) and 970.01(2) (Mr. Glover was arrested without a warrant and on May 30, 1989 brought before an initial appearance hearing court, the complaint *shall* be filed on the initial appearance hearing court against him now) in conjunction with Wis. § 970.02(1)(a) (at this initial appearance hearing the court *shall* inform Mr. Glover of the charge against him and *shall* furnish him with a copy of the complaint which *shall* contain the possible penalties for the offenses set forth therein. In the case he is charged with a felony, the judge *shall* also inform him of the penalties for that felony which he is charged).

The criminal circuit court at the outset of this criminal case [initial appearance] adjudicated thereinafter on unconstitutional and unlawful "hypothetical jurisdiction," no written mandatory and jurisdictional accusatory instrument ("complaint", Wis. § 968.01(2)) was filed on it by the prosecutor to invoke it subject-matter jurisdictional power, *see* (Pet. App. 57a-65a).

No charge existed for the criminal circuit court to find probable cause for Mr. Glover's warrantless arrest and detention as it did not, nor to set a Ten Thousand Dollar, $10,000.00 bail on Mr. Glover as it did to hold him, because the prosecutor did not file her written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)) against Mr. Glover charging him with a crime, *see* (Pet. App. 57a-65a). The criminal circuit court could not set bail on Mr. Glover for a nonexistent offense, the law mandates that the criminal circuit court can only set bail for a charged offense therein a written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)). *See* Wis. § § § 969.02(1), 969.03(1) and 970.02(2).

On January 8, 1990, jury trial commenced, but ended in a plea. Mr. Glover pled not because he was guilty, but because he feared the criminal circuit court judge. *See* (Pet. App. 89a-97a).

Mr. Glover was actually innocent of the crimes and the record on its face demonstrates this as well, it is impossible for the alleged incident to have taken place at all. S.B.'s statements and testimony was incredible on its face, but the criminal circuit court judge forced Mr. Glover to plead in fear of him. *Id.*

The criminal circuit court lacking subject-matter jurisdiction and personal jurisdiction from the outset [initial appearance] of the criminal case, to adjudicate a criminal case against Mr. Glover, to condemn him and enter a judgment of conviction against him, *see* (Pet. App. 57a-65a), without

jurisdiction being conferred on it by law, which amounted to no more than consent and hypothetical jurisdiction. Thus, the criminal circuit court, which sentenced Mr. Glover, was therefore without jurisdiction, and its judgment is void, *see* (Pet. App. 72a-74a). The judgment of conviction Mr. Glover is imprisoned and confined thereunder is absolutely void for want of jurisdiction in the court that pronounced it, *see* (Pet. App. 72a-74a, Judgment of Conviction, Case No. 89CF402), because such jurisdiction was absent at the beginning of the proceeding, *see* (Pet. App. 57a-65a, Initial Appearance Transcript, Case No. 89CF402).

B. *The Proceedings In The Seventh Circuit*

On July 26, 2010, Ricardo Glover, a layman (*pro se*) litigant filed a document entitled "Petition For The Court To Rescind Its' Original Order And Recall The Mandate Thereof Denying Habeas § 2254 Appeal Base On Extraordinary Circumstances And In The Interest Of Justice" in the Seventh Circuit. *See* (Pet. App. 2a-111a).

1. Mr. Glover's petition liberally construed demonstrated a need for the Seventh Circuit to revisit and correct it original decision denying habeas corpus relief to him and to recall the mandate thereof. *Id.* Because, the Seventh Circuit on Mr. Glover's original 28 U.S.C. § 2254 appeal failed to interpret the subject-matter jurisdictional scheme, *see* Wis. § § § § 968.01(2), 968.04(1)(a), 970.01(2) and 970.02(1)(a) for invoking a Wisconsin criminal circuit court's subject-matter jurisdictional power to

adjudicate a case at the outset, *see* Wis. § 753.03 and thereafter to enter a judgment of conviction. *See* (Pet. App. 111a). In addition, if the decision remained would work a manifest injustice. *See* (Pet. App. 2a-111a). Only the Wisconsin Legislature may determine a criminal circuit court's subject-matter jurisdiction in Wisconsin. The legislature created the criminal circuit courts by written law, and defined their subject-matter jurisdiction by written law, *see* Article VII, Section 8 of the Wisconsin Constitution and Wis. § 753.03.

The Wisconsin Legislature set forth in Wis. § § 968.04(1)(a)[2] and 970.01(2),[3] in conjunction with Wis. § 970.02(1)(a) [4] *stringent time requirements* that the

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[2] Wisconsin Chapter 968, Commencement Of Criminal Proceedings, Wis. § 968.04(1)(a) – *Warrant or summons on complaint*, which provides in relevant part: "When an accused has been arrested without a warrant and is in custody ... no warrant *shall* be issued and the complaint *shall* be filed forthwith with a judge." (Emphasis added). *See* (Pet. App. 49a).

[3] Wisconsin Chapter 970 Criminal Procedure – Preliminary Proceedings, Wis. § 970.01(2) – *Initial appearance before a judge*, which provides: "When a person is arrested without a warrant and brought before a judge, a complaint *shall* be filed forthwith." (Emphasis added). *See* Pet. App. 51a).

[4] Wisconsin Chapter 970 Criminal Procedure – Preliminary Proceedings, Wis. § 970.02(1)(a) – *Duty of a judge at the initial appearance*, which provides: "At the initial appearance the judge *shall* inform the defendant: Of the charge against him and *shall* furnish the defendant with a copy of the complaint which *shall* contain the possible penalties for the offenses set forth therein. In the case of a felony, the judge *shall* also inform the defendant of the penalties for the felony with which the defendant is charged." (Emphasis added). *See* (Pet. App. 51a).

mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)) *shall* be filed prior to or at Mr. Glover's initial appearance on the criminal circuit court by the prosecutor, from the warrantless and detention of his person, where he has been forcedly brought before the criminal circuit court by the prosecutor to invoke the criminal circuit court's subject-matter jurisdictional power to adjudicate the proceedings pursuant to Wis. § 753.03. *See* (Pet. App. 57a-65a).

In addition, the Wisconsin Legislature made no provision therein Wis. § § § 968.04(1)(a), 970.01(2) or 970.02(1)(a), giving the criminal circuit court the power to grant the prosecutor time to extend the filing of her timely and written mandatory and jurisdictional accusatory instrument ("complaint," Wis. 968.01(2)) after Mr. Glover's initial appearance to invoke its subject-matter jurisdiction. Only the Wisconsin Legislature may determine a criminal circuit court's subject-matter jurisdiction. No action by the criminal circuit court can obtain subject-matter jurisdiction not given to it by the Legislature. The issue of subject-matter jurisdiction is not waivable by the parties. Thus, if subject-matter jurisdiction cannot be assumed or waived, any judgment by a criminal circuit court [trial court] is necessarily void. There is no action over time that can change a void judgment.

2. Mr. Glover's petition liberally construed to the Seventh Circuit represented that the Seventh Circuit made a grave error in deciding his original 28 U.S.C. § 2254 habeas corpus appeal, where he challenged that the state criminal circuit court lacked subject-

matter jurisdiction to adjudicate a criminal case against him at the outset and thus, lacked subject-matter jurisdictional power to rendered a judgment of conviction against him. Mr. Glover presented to the Seventh Circuit that extraordinary circumstances existed and in the interest of justice based on the fundamental and threshold principles of subject-matter jurisdictional law dictated that it rescind its' original order and recall the mandate thereof denying his 28 U.S.C. § 2254 habeas corpus appeal. *See* (Pet. App. 2a-111a). Therein Mr. Glover's petition, he presented:

> a) That "he is actually innocent and his liberty was unconstitutionally and unlawfully taken from him";
>
> b) That the indictment, information or complaint is the jurisdictional accusatory instruments that invokes criminal circuit courts' subject-matter jurisdictional power or authority to adjudicate and then to enter a judgment;
>
> c) An enactment, what should have happened and what did not happened in this case, the case should have been dismissed against Mr. Glover from the outset;
>
> d) On-point cases to Mr. Glover's case, creating extraordinary circumstances and in the interest of

> justice for the court to rescind its' original order and recall the mandate thereof; and,
>
> e) No provision of the constitution or statute, or both, gave the Criminal circuit court jurisdictional power to adjudicate at the outset, [initial appearance], to condemn and enter a judgment against Mr. Glover..

See (Pet. App. 2a-45a).

3. The Seventh Circuit stated on Mr. Glover's original 28 U.S.C. § 2254 habeas corpus appeal that he waived his right to challenge the subject-matter jurisdiction of the state criminal circuit court because he did not raise it in a timely manner. *See* (Pet. App. 111a). However, in *Appleton Elec. Co. v. Graves Truck Line, Inc.*, 635 F.2d 603 (7th Cir. 1980), the Seventh Circuit held:

> "[T]hat a lack of jurisdiction cannot be waived by the parties. Insofar as our pronouncement from the bench implied that Graves had waived its jurisdictional defense by failing to raise it in a timely fashion, we now perceive that we were in error."

See Graves, 635 F.2d at 608. In addition, the Seventh Circuit has stated as this Court that nothing can waiver subject-matter jurisdiction. A jurisdictional defect is not waivable by a guilty or no contest plea.

See United States v. Bell, 70 F.3d 495, 496 (7th Cir. 1995). "[A]ny attempt to waive this jurisdictional issue in a plea agreement would have been ineffectual because a defendant cannot confer jurisdiction on a court by way of plea agreement." *See United States v. Vega*, 241 F.3d 910, 912 (7th Cir. 2001). In addition, the Seventh Circuit has also held:

> A "[d]efects in subject-matter jurisdiction, however, may not be waived or forfeited." *See Moore v. Olson*, 368 F.3d 757, 759 (7th Cir. 2004);; *Leguizamo-Medina v. Gonzales*, 493 F.3d 772, 774 (7th Cir. 2007), ("'Respondent declines to assert that the Court lacks jurisdiction over this issue,' as if subject-matter jurisdiction were something that litigants may waive or forfeit when they think it would be easier to decide the merits. That's not right. *See Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Subject-matter jurisdiction always comes ahead of the merits."); *see also Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, 1055 (7th Cir. 1983) (The corollary to the rule is that subject-matter jurisdiction otherwise lacking cannot be conferred by consent, collusion, laches, waiver, or estoppel.).

Thus, the Seventh Circuit's original decision was clearly erroneous and would work a manifest injustice because Mr. Glover cannot waive or forfeit

his fundamental and threshold claim that the state criminal circuit court's lacked subject-matter jurisdiction at the outset of the case against him and to enter a judgment of conviction against him by failing to raise it in a timely fashion.

4. Next, in its original opinion, the Seventh Circuit cited *United States v. Smith*, 80 F.3d 1188 (7th Cir. 1996) as a case of authority to deny Mr. Glover's subject-matter jurisdictional claims. *See* (Pet. App. 111a). However, the *Smith* case did not apply to Mr. Glover's subject-matter jurisdictional challenges. The facts regarding Mr. Glover's subject-matter jurisdictional claims are set-forth above of this petition and in his petition to the Seventh Circuit. *See* (Pet. App. 2a-111a). The *Smith* case was very distinguishable from Mr. Glover's case, because therein *Smith*, the trial court (district court) had subject-matter jurisdiction over the case against *Smith*, which was not an issue, and had personal jurisdiction over *Smith's* person therein, nor was there a challenged to the district court's subject-matter jurisdiction or personal jurisdiction. The *Smith* case is outlined as follows:

> "The government filed a *criminal complaint against Smith on April 13, 1993, charging that he had violated* 18 U.S.C. § 659 by stealing the Foodland shipment. *Smith was arrested on July 27, 1993, and he made an initial appearance before the district court on July 28, 1993.* On August 3, 1993, United States District Judge Brian Duff of the Northern District of Illinois

revoked Smith's supervised release from a conviction for conspiring to steal an interstate shipment of copper in 1991. Judge Duff revoked Smith's supervised release, in part, because of Smith's arrest for the March 23, theft, and he sentenced Smith to one year of imprisonment. On August 5, 1993, the district court granted the government's motion, which was agreed to by Smith's counsel, to dismiss the criminal complaint with prejudice.

On March 18, 1994, a grand jury indicted Smith for the March 23, 1993, theft of the Born's Transfer truck and trailer and the Foodland-bound cargo ... the grand jury returned a superseding indictment on September 14, 1994, which, in addition to the original two counts, charged Smith with one count of interstate transportation of a stolen motor vehicle in violation of 18 U.S.C.A. § 2312. The district court denied Smith's motion to dismiss the indictment for unnecessary delay after finding that Smith had failed to make the required showing of prejudice.

Initially, Smith argues that the district court erred in denying his motion to dismiss the indictment for unnecessary delay. Smith based his motion to dismiss on the argument that the government's requested dismissal of

> the complaint following the revocation of his supervised release, and subsequent re-indictment immediately prior to the end of his revocation sentence, violated his right to due process by denying him the opportunity to 'resolve' the revocation proceeding and the Foodland theft charges simultaneously. Smith alleges he suffered prejudice because, as a result of the delay, he was precluded from serving the revocation sentence and the sentence for the Foodland theft concurrently."

See Smith, 80 F.3d at 1190-1191, 1191. The *Smith* case was very distinguishable from Mr. Glover's case. In addition, the defendant in *Smith* did not raise a subject-matter or personal jurisdictional challenges as Mr. Glover raised. *Id.* The original decision of the Seventh Circuit was clearly erroneous and would work a manifest injustice if it remains. *See* (Pet. App. 111a).

5. The Seventh Circuit has held that appeals are decided erroneously by a panel thereof, and must later be withdrawn to prevent a manifest injustice. The Seventh Circuit has "long held that 'matters decided on appeal became the law of the case to be followed ... on second appeal, in the appellate court, unless there is plain error of the law in the original decision.'" *See Creek v. Village of Westhaven*, 144 F.3d 441, 446 (7th Cir. 1998) (*quoting Appleton Electric Co. v. Graves Truck Line, Inc.*, 635 F.2d 603, 607 (7th Cir. 1980)). The Seventh Circuit said:

> "The demands of justice require that [the appellate court] not follow an earlier ruling 'where the law as announced is clearly erroneous, and establishes a practice which is contrary to the best interests of society, and works a manifest injustice in the particular case.'"... "[T]his court has, on a limited number of occasions, reconsidered a previous adjudication and has concluded that our former ruling was erroneous."

See Creek, 144 F.3d at 446. Mr. Glover's petition, *see* (Pet. App. 2a-111a), liberally construed represented a request that "the interests of justice would make unfair the strict application of" 28 U.S.C. § 2244(b). *See Gondeck v. Pan American Would Airways, Inc.*, 382 U.S. 25, 27 (1965) (*quoting United States v. Ohio Power Co.*, 353 U.S. 98, 99 (1957)).

6. On August 23, 2010, the Seventh Circuit denied Mr. Glover's petition, recharacterizing the petition, stating that it "constitutes a second or successive collateral attack that may be commenced only if the criteria of 28 U.S.C. § 2244(b) have been satisfied, *Calderon v. Thompson*, 523 U.S. 538, 553-54 (1998), which is not here argued. Indeed, by iterating the claim previously presented, authorization would be barred by § 2244(b)(1)." *See* (Pet. App. 1a). The Seventh Circuit has stated in another decision that 28 U.S.C. § 2244(b) restricts it from revisiting a 28 U.S.C. § 2254 case and any relief must come from the "Supreme Court." *See Lambert*

v. Buss, 489 F.3d 779, 781 (7th Cir. 2007) (Ripple, J., concurrence). However, in this case, it was the error of Seventh Circuit for failing to interpret and apply the subject-matter jurisdictional statutory and constitutional scheme for a trial court to acquire jurisdiction over criminal subject-matter and the person. *See* (Pet. App. 111a).

In addition, the Seventh Circuit's unauthorized recharacterization of Mr. Glover's petition is unlike "liberal construction" because it required the Seventh Circuit to "deliberately" override Mr. Glover's, who is a layman (*pro se*) litigant's choice of procedural vehicle for his claims, this is as equal to Mr. Glover's as to his counterparts, federal litigants. *See Castro v. United States*, 540 U.S. 375, 386 (2003) (Scalia, J., concurring in part and concurring in judgment) (Recharacterization ... requires a court deliberately to override the *pro se* litigant's choice of procedural vehicle for his claim).

Mr. Glover was without the assistance of counsel in the Seventh Circuit, in *Erickson v. Pardus,* 551 U.S. 89 (2007), this Court stated where a layman (*pro se*) litigant as Mr. Glover brings a pleading to a court and is unaided by counsel, he is entitled to liberal construction of his pleadings, not recharacterization, the Court said:

> "The Court of Appeals' departure from the liberal pleadings standard set forth by Rule 8(a)(2) is even more pronounced in this particular case because. Petitioner has been

> proceeding, from the litigation's outset, without counsel. A document filed *pro se* is 'to be liberally construed,' *Estelle,* 429 U.S., at 106, 97 S. Ct. 285, 50 L.Ed.2d 251, and 'a *pro se* complaint, however inactfully pleaded, must be held to less stringent standard than formal pleadings drafted by lawyers,' ibid. (internal quotation marks omitted). *Cf.* Federal Rules Civil Procedure 8(f)('All pleadings shall be so construed as to do substantial justice')."

See 551 U.S. at 94. This petition follows.

REASONS FOR GRANTING THE PETITIONS

Mr. Glover, a layman (*pro se*) litigant asks the Court to liberally construe this petition, not limiting review to the questions presented.

A. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURTS OF APPEALS, STATE COURTS AND THE SUPREME COURT.

By refusing to comply with the fundamental and threshold principles of subject-matter jurisdictional law to rescind its' original order and recall the mandate thereof denying habeas § 2254 appeal base on extraordinary circumstances and in the interest of justice, *see* (Pet. App. 1a, 2a-111a), the Seventh Circuit stands in conflict with all other federal courts

of appeals and this Court. In addition, the order of the Seventh Circuit below creates several conflicts among courts of appeals and state courts, because there can be no finality of judgments entered, where the judgments was entered by courts that lacked subject-matter jurisdictional power or authority to enter them, and, the interest in finality of litigation must yield where the interest of justice would make unfair the strict application of 28 U.S.C. § 2244(b), where a subject-matter jurisdiction claim was misinterpreted or not interpreted by the courts of appeals in an original 28 U.S.C. § 2254 appeal. Certiorari review is warranted to resolve this split in the federal courts of appeals and other courts.

Before the existence of courts of appeals, this Court recalled its' mandate based on a jurisdiction issue. *See Snow v. United States*, 118 U.S. 346 (1886). In *Snow*, the Court was alerted for the first time that it had predicated its assertion of jurisdiction in an earlier decision on an erroneous interpretation of a statute. *See* 118 U.S. at 354. Finding that "the want of jurisdiction in it is clear" the Court "decided to vacate [the] judgment, and recall the mandate, and dismiss the writ of error for want of jurisdiction." *Id.* at 354, 6 S.Ct. at 1064.

In *United States v. Ohio Power Co.*, 353 U.S. 98 (1957), this Court stated that it has "consistently ruled that the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules. This policy finds expression in the manner in which we have exercised our power over our own judgments, both in civil and criminal cases." *Id* at 99 (cases cited).

Thereafter *Ohio Power Co.*, in *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965), there two plaintiffs brought wrongful death action against the same defendant for death raising from the same accident. The United States Court of Appeals for the Fifth Circuit denied recovery to the first plaintiff under the longshoremen's and Harbor Workers' Compensation Act; this Court denied certiorari and a petition for rehearing. *Id* at 26. The United States Court of Appeals for the Fourth Circuit's subsequently upheld an award to the second plaintiff, explicitly disagreeing with the Fifth Circuit. In an unrelated case, this Court later adopted the Fourth Circuit's approach. This Court noted that its adoption of the Fourth Circuit's approach left *Gondeck* as the only victim who did not receive compensation from the accident, and cited "the established doctrine that 'the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of our rules.'" *Id.* at 26-27 (quoting *United State v. Ohio Power Co.*, 353 U.S. 98, 99, 1L. Ed. 2d 683, 685, 77 S. Ct. 652 (1957)). Accordingly, this Court vacated its earlier denial of certiorari and reversed the judgment of the Fifth Circuit.

In *Calderon v. Thompson*, 523 U.S. 538 (1998), this Court acknowledged that the courts of appeals have the authority to recall their mandates and may only exercise that power "in extraordinary circumstances" due to "'the profound interest in repose' attaching to the mandate." *See Calderon*, 523 U.S. at 550 (*quoting* 16 C. Wright, A. Miller, E. Cooper, *Federal Practice and Procedure* § 3938 p.712

(2d ed. 1996)). "The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *See Calderon*, 523 U.S. at 550. *Calderon* recognized three exceptions that might be available to allow a recall of the mandate in a 28 U.S.C. § 2254 habeas case, where the requirements of 28 U.S.C. § 2244(b) are not met: (1) when necessary to correct a clerical error; (2) when the prior habeas judgment was obtained by fraud on the part of the state; and (3) when a mandate is stayed under Fed. R. App. P. 41." *See Calderon*, 523 U.S. at 557.

This Court did not explicitly state in either *Snow*, *supra*, *Ohio Power Co.*, *supra*, *Gondeck*, *supra* or *Calderon*, *supra*, that a subject-matter jurisdictional claim misinterpreted or not interpreted at all constitutes as extraordinary circumstances and in the interest of justice for recalling the judgments or mandates of the courts of appeals. However, *Snow*, *Ohio Power Co.*, *Gondeck*, or *Calderon*, none of which was discussed by the Seventh Circuit below, that is extraordinary circumstances and in the interest of justice, the Seventh Circuit refused to liberally construe Mr. Glover's petition for its sole intended purpose. *See* (Pet. App. 1a, 2a-111a).

A decision to recall a mandate or judgment must of necessity include a balance of competing interests. However, the interest of justice outweighs the interest of bringing litigations to an end and courts should recall their mandates for this reason. Although, the judgment of conviction, *see* (Pet. App. 72a-74a), and the habeas corpus judgment, *see* (Pet. App. 112a-113a) and the mandates or judgments

thereof in this case was issued years ago, there was no reason why they may not be recalled by the Seventh Circuit to prevent a manifest injustice. Accordingly, the Seventh Circuit's order, *see* (Pet. App. 1a) conflicts with the implicit holding of *Snow*, *Ohio Power Co.*, *Gondeck*, or *Calderon*.

The Order of the Seventh Circuit below also creates a conflict among the courts of appeals with regards to whether extraordinary circumstances exists and in the interest of justice to recall its mandate and rescind its original decision, based on an misinterpretation or no interpretation regarding a subject-matter jurisdictional claim. In *IAL Aircraft Holding, Inc., v. Federal Aviation Administration*, 216 F.3d 1304 (11th Cir. 2000), [decided after *Snow*, *Ohio Power Co.*, *Gondeck*, or *Calderon*], the Eleventh Circuit was asked to recall its mandate, which required it to revisit its' earlier decision, which it stated was a part of it's' "continuing duty to review [the] jurisdiction of an appeal at any point in the appellate process." *Id.* at 1305 (*quoting National Solid Waste Management Assoc. v. Alabama Dep't of Envtl. Management*, 924 F.2d 1001, 1002 (11th Cir. 1991)). The Eleventh Circuit based its' decision to recall its' mandate and vacate its' opinion on this Court's decision in *Snow*, *supra*, the Eleventh Circuit stated:

> "Although it is rather unusual for a court to learn, after its mandate issues, that its prior decision lacked a jurisdictional basis, the few courts confronting this issue uniformly have vacated their prior decision. In *Snow v.*

> *United States*, the Supreme Court was alerted for the first time that it had predicated its assertion of jurisdiction in an earlier decision on an erroneous interpretation of a statute. *See* 118 U.S. 346, 354, 6 S.Ct. 1059, 1064, 30 L.Ed. 207 (1886). Finding that 'the want of jurisdiction in I is clear' the Court 'decided to vacate [the] judgment, and recall the mandate, and dismiss the writ of error for want of jurisdiction.' *Id.* at 354, 6 S.Ct. at 1064."

See FAA, 216 F.3d at 1306. The Eleventh Circuit concluded that,

> "Even though we lacked jurisdiction at the time we issued our earlier opinion, IAL nevertheless contends this court may not vacate a decision for mootness after the mandate issues absent extraordinary circumstances. *See Calderon v. Thompson*, 523 U.S. 538, 550, 118 S.Ct. 1489, 1498, 140 L.Ed.2d 728 (1998). Jurisdiction is a threshold question, however, and this court was without jurisdiction when the original decision and mandate issued. Under these circumstances, we are compelled to recall the mandate and vacate our earlier decision."

Id. 1306-1307. The Eleventh Circuit found that "[j]urisdiction is a threshold question," thus

compelled it to recall its mandate and vacate its opinion.

In *United States v. Crawford*, 422 F.3d 1145 (9th Cir. 2005), the Ninth Circuit recalled its' mandate, vacated the opinion and remanded the case back to the district court. The Ninth Circuit stated in *Crawford* that "[t]his case involves 'extraordinary circumstances" sufficient to justify our recall of the mandate. *Id.* at 1146 (*citing Calderon v. Thompson*, 523 U.S. 538, 550, 140 L.Ed.2d 728. 118 S.Ct. 1489)). In *Crawford*, the Ninth Circuit stated that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005) was not, by itself, sufficient to justify recall of the cases finalized before *Booker* was filed.

However, the Ninth Circuit in *Crawford*, recalled its' mandate based on a pre-*Booker* sentence to allow the district court to re-sentence the defendant under *Booker*. The Ninth Circuit based its' decision on the existence of two "extraordinary circumstances": (1) that the sentencing judge had expressed about the sentence required under the mandatory Guidelines; and (2) that the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), which "foreshadowed" its holding in *Booker*, was rendered before its mandate issued in *Crawford*. *See Crawford*, 422 F.3d at 1154-46.

In the Order below, the Seventh Circuit refused to determine whether the fundamental and threshold principles of subject-matter jurisdictional law, created extraordinary circumstances and in the

interest of justice to compel it to recall its mandate and vacate its' original opinions in cases, where it had failed to interpret a subject-matter jurisdictional claim in an original 28 U.S.C. 2254 appeal. *See* (Pet. App. 1a, 111a). However, other courts have found an extraordinary circumstance exists and in the interest of justice to recall their mandates and vacate their opinions, and the Seventh Circuit refuses to address the issue. The Seventh Circuit has stated in another case that 28 U.S.C. § 2244(b) restricts it from revisiting a 28 U.S.C. § 2254 case and any relief must come from the "Supreme Court." *See Lambert v. Buss*, 489 F.3d 779, 781 (7th Cir. 2007) (Ripple, J., concurrence). However, in this case, it was the error of the Seventh Circuit for failing to interpret and apply the subject-matter jurisdictional statutory and constitutional scheme for a trial court to acquire jurisdiction over criminal subject-matter and personal jurisdiction over the person. *See* (Pet. App. 1a, 111a).

The *Snow* case was decided in 1886, the *Ohio Power Co.* case was decided in 1957, the *Gondeck* case was decided in 1965 and the *Calderon* case was decided in 1998, therefore, the issue is therefore now ripe for this Court's consideration.

This case provides a perfect vehicle to address. whether "an extraordinary circumstance" exists and "the interest in finality of litigation must yield where the interests of justice would make unfair the strict application of" 28 U.S.C. § 2244(b) in a 28 U.S.C. § 2254 habeas cases, based on fundamental and threshold principles of subject-matter jurisdictional law, where the courts of appeals made a

misinterpretation or no interpretation at all in an original 28 U.S.C. § 2254 opinion regarding the petitioners' subject-matter jurisdictional claims and when it is brought to the courts of appeals attention after their mandate had issued in an extraordinary request for relief to prevent an "manifest injustice." This Court should grant certiorari review to prevent a manifest injustice.

B. IMPORTANCE OF THE QUESTIONS PRESENTED

The States of Wisconsin and Ohio, and other jurisdictions have the identical commencement of criminal proceedings. In Wisconsin, Chapter 968 – "COMMENCEMENT OF CRIMINAL PROCEEDINGS," mandates that the accusatory instrument, criminal complaint *shall* be filed to commence criminal proceedings against the accused in the criminal circuit courts. *See* Wis. § 968.01(2) *complaint* provides: "The complaint is a written statement of the essential facts constituting the offense charged." The Ohio criminal courts have the identical *commencement of criminal proceedings* against the accused, to commence criminal proceedings against the accused, mandating that a criminal complaint *shall* be filed. *See* Ohio Criminal Rule 3 ("The complaint is a written statement of the essential facts constituting the offense charged.").

A Wisconsin criminal "circuit court's subject-matter jurisdiction attaches when the complaint is filed ... the circuit court lacks criminal subject-matter jurisdiction only where the complaint does not charge

an offense known to law." *See Aniton*, 183 Wis.2d at 129, 515 N.W.2d at 303.[6] "[A] defect that deprives a court of subject matter jurisdiction cannot be waived by an accused. The absence of the criminal complaint cannot be waived by a plea of no contest or even guilty, since any conviction resulting from an invalid complaint is a nullity." *See e.g., State v. Green*, 48 Ohio App.3d 121, 548 N.E.2d 334 (Ohio 1988); *State v. Miller*, 47 Ohio App.3d 113, 114, 547 N.E.2d 399, 401 (Ohio 1988) (In the absence of a sufficient formal accusation, a court acquires no jurisdiction whatsoever, and if it assumes jurisdiction, a trial and conviction are a nullity ... the complaint is the jurisdictional instrument of the municipal court.").

The State of Ohio, uses a criminal complaint as its initial charging instrument as Wisconsin. *See e.g., State v. Sharp*, 2009 Ohio 1854, 2009 Ohio App. LEXIS 1561 (Ohio App. 2009), where the Ohio Court of Appeals stated: "In the absence of a sufficient

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[6] Subject-matter jurisdiction is not waivable, and may be raised despite guilty plea. *See e.g. State v. Aniton*, 183 Wis.2d 125, 129, 515 N.W.2d 302, 303 (1994). "The general rule applicable in criminal proceedings ... is that by pleading guilty, the defendant ... waives all nonjurisdictional defects." *See e.g. State v. Norris*, 2004 UT App. 267, ¶4, 97 P.3d 732, 735-736 (Utah App. 2004). A plea of guilty or no contest "waives all nonjurisdictional defects and defenses," and that "'[j]urisdictional defects' can involve the court's personal jurisdiction over the person of the defendant or the court's jurisdiction over the subject matter of the proceeding." *See e.g. State v. Dietzen*, 164 Wis.2d 205, 210, 474 N.W.2d 753, 755 (Wis.App. 1991). "Subject matter jurisdiction is conferred on the court by law; it cannot be conferred by consent, nor can it be waived." *See Dietzen*, 164 Wis.2d at 210-211, 474 N.W.2d at 755.

formal accusation, a Court acquires no jurisdiction whatsoever, and if it assumes jurisdiction, a trial and conviction are a nullity ... The complaint is the jurisdictional instrument of the municipal court." *See Sharp*, 2009 Ohio 1854, ¶14, 2009 Ohio App. LEXIS 1561, **5. "A court's subject matter jurisdiction is invoked by the filing of a complaint." *See Id.* "The filing of a valid complaint is therefore a necessary prerequisite to a court's acquiring jurisdiction." 2009 Ohio 1854, ¶14, 2009 Ohio App. LEXIS 1561, **5-6. "We review the determination of subject matter jurisdiction *de novo*, without any deference to the trial court." *See Sharp*, 2009 Ohio 1854, ¶14, 2009 Ohio App. LEXIS 1561, **6. The *Sharp court* further stated that,

> "[T]he defense of subject-matter jurisdiction can never be waived ... The absence of the criminal complaint cannot be waived by a plea of no contest or even guilty, since any conviction resulting from an invalid complaint is a nullity. *State v. Bishop*, (1993), Clark App. No. 3070, 1993 Ohio App. LEXIS 5799, unreported. The question of subject matter jurisdiction is so basic that it can be raised at any stage before the trial court or any appellate court, or even collaterally in subsequent and separate proceedings.
>
> * * * * * *
>
> [I]f the complaint were not properly filed, the convictions are void ab initio

> for want of subject matter jurisdiction, as the jurisdiction of the Mount Vernon Municipal Court was never invoked. Further, appellant is not barred from raising the issue at this stage in the proceedings, as subject matter jurisdiction cannot be waived."

See Sharp, 2009 Ohio 1854, ¶15 & ¶17, 2009 Ohio App. LEXIS 1561, **6, **7; *City of Zanesvill v. Rouse*, 2009 Ohio 2689, 2009 App. LEXIS 2278 (Ohio 2009).

Wisconsin criminal circuit courts were created by written law, and their subject-matter jurisdiction is defined by written law, *see* Article VII, Section 8 of the Wisconsin Constitution and Wis. § 753.03. Only the Wisconsin Legislature may determine a criminal circuit court's subject-matter jurisdiction. The criminal circuit courts, "cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which the opinion is found, because it has been repeatedly given by this Court; and with decisions hereto rendered on this point, no member of the bench has, even for an instant, been dissatisfied." *See Ex parte Bollman*, 4 Cranch 75, 93, 2 L.Ed. 554 (1807). Two-hundred years later, in 2007, this Court in *Bowles v. Russell*, 551 U.S. 205, 214 (2007), enforced its *Bollman* decision when it held that courts have "no authority to create equitable exceptions to jurisdictional requirements." "[O]nly Congress may determine a lower federal court's subject-matter jurisdiction," the critical inquiry in determining whether a particular timing rule is jurisdictional is whether it is set forth in a statute. *See Bowles*, 551

U.S. at 211 (internal citations omitted). This Court stated in *Bowles*,

> In *Bowles*, this Court held that "the taking of an appeal within the prescribed time is 'mandatory and jurisdictional.'" (citation omitted). "Indeed, even prior to the creation of the circuit courts of appeals, [the Supreme] Court regarded statutory limitations on the timing of appeals as limitations on its own jurisdiction" *Id.* 551 U.S. at 209-210.
>
> In *Bowles*, the petitioner had been denied a writ of habeas corpus by the Northern District of Ohio, but was told by the district court that he had seventeen days to file a notice of appeal. *Id.* 551 U.S. at 206-208. Contrary to the district court's instructions, however, the Federal Rules of Appellate Procedure only provided a period of fourteen days to file a notice of appeal. *Id.* Thus, when the petitioner filed his notice of appeal on the sixteenth day following the district court's decision, the Sixth Circuit held that it lacked jurisdiction to hear the appeal, and the Supreme Court affirmed. *Id.*
>
> In its opinion, this Court stated that "[t]oday we make clear that the timely filing of a notice of appeal in a

civil case is a jurisdictional requirement." *Id.* 551 U.S. at 214. Furthermore, this Court stated that "[i]f rigorous rules like the one applied today are though to be inequitable, Congress may authorize court to promulgate rules that excuse compliance with the statutory time limits." *See Bowles*, 551 U.S. at 214.

In *Bowles*, this Court held that a "mandatory and jurisdictional" instrument (notice of appeal) cannot be filed outside its prescribed mandatory time limitation period, no delays nor extension will suffice, a court does not have subject-matter jurisdiction beyond the mandatory prescribed time limitation period. This Court stated in *Bowles*, that "[j]urisdictional treatment of statutory time limits makes good sense. Within constitutional bounds," *See id.* 551 U.S. at 212.

There is no difference in this present case from the *Green, supra,* case and *Sharp, supra,* case and this Court's decision in *Bowles.*[7] In this case, on May

[7] The accusatory instrument (complaint) was not filed on the criminal circuit court in accordance with the prescribed time limitation period, the conviction and judgment entered against Mr. Glover is therefore void ab initio for want of subject matter jurisdiction, as the jurisdiction of the criminal circuit court was never invoked, as subject matter jurisdiction cannot be waived. *See United States v. Griffin*, 303 U.S. 226, 229 (1938); *see also United States v. Cotton*, 535 U.S. 625, 630 (2002).

30, 1989, at Mr. Glover's initial appearance hearing, *see* (Pet. App. 57a-65a), the prosecutor informed the criminal circuit court that she did not filed her written mandatory and jurisdictional accusatory instrument ("complaint," Wis. 968.01(2)) against Mr. Glover in accordance with the prescribed time limitation period, the prosecutor was informed by the criminal circuit court that she could file her accusatory instrument ("complaint," Wis. 968.01(2)) against Mr. Glover on the next day, May 31, 1989, after his initial appearance hearing. Contrary to the criminal circuit court's instructions, however, the Wisconsin Rules of Criminal Procedure – Chapter 968, *commencement of criminal proceedings*, mandated that the written mandatory and jurisdictional accusatory instrument ("complaint," Wis. § 968.01(2)) *shall* be filed by the prosecutor against Mr. Glover at his initial appearance hearing on the court, which was held on May 30, 1989, from the warrantless arrest and detention of his person in according to the time limitation period provided by Wis. § § 968.04(1)(a) (Mr. Glover was arrested without a warrant on May 29, 1989 and was in police custody, no warrant *shall* be issued for him and the complaint charging him with an offense *shall* be filed now or at his initial appearance on the criminal circuit court by the prosecutor) and 970.01(2) (Mr. Glover was arrested without a warrant and on May 30, 1989 brought before an initial appearance hearing court, the complaint *shall* be filed on the initial appearance hearing court against him prior to or now), in conjunction with Wis. § 970.02(1)(a) (at this initial appearance hearing the court *shall* inform Mr. Glover of the charge against him and *shall* furnish him with a copy of the complaint which *shall* contain

the possible penalties for the offenses set forth therein. In the case he is charged with a felony, the judge *shall* also inform him of the penalties for that felony which he is charged) to invoke the criminal circuit court's subject-matter jurisdictional power to adjudicate pursuant Wis. § 753.03.

Thus, when the prosecutor filed her accusatory instrument ("complaint') the next day (May 31, 1989) outside of the mandatory and jurisdictional time limitation period, after Mr. Glover's initial appearance held on May 30, 1989, following the criminal circuit court's decision, the criminal circuit court lacked jurisdiction to hear the criminal action against Mr. Glover on May 31, 1989. The criminal circuit court has "no authority to create equitable exceptions to jurisdictional requirements," *see Bowles*, 551 U.S. at 214, nor to "transcend that jurisdiction." *See Bollman*, 4 Cranch at 93.

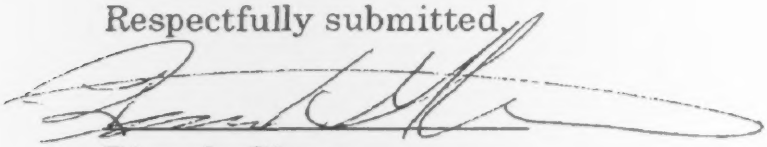
Mr. Glover stands alone with receiving no relief from a void judgment of conviction that binds him to the present unconstitutional and unlawful imprisonment and confinement, where all other petitioners have received the correct evaluation, an independent review, followed by the statutory and constitutional interpretation of their subject-matter jurisdictional claims. *See Vega*, 241 F.3d at 911-912; *United States v. Higgs*, 504 F.3d 456, 463-464 (3rd Cir. 2007). This Court should grant certiorari to prevent a manifest injustice.

CONCLUSION

The petition for a writ of certiorari should be granted, or at a minimum remanded to the Seventh Circuit.

Dated this 3rd day of January, 2011.

Respectfully submitted,



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Committed in this County; and

On Feb. 22, 1990, the Court inquired of the defendant why sentence should not be pronounced, and no sufficient grounds to the contrary being shown or appearing to the Court, the Court having accorded the district attorney, defense counsel and the defendant an opportunity to address the Court regarding sentence; and upon all the evidence, records and proceedings, the Court pronounced judgment as follows:

IT IS ADJUDGED that the defendant on 2-22-90 was convicted as found guilty, and is sentenced to the Wisconsin State Prisons for an indeterminate term of not more that Ct. 1: 20 years; Ct 2: 20 years to run consecutive to ct 1; Ct 3: 5 years to run consecutive to ct 2.

IT IS DETERMINED AND ORDERED that the record requires court-imposed conditions as follows:
☐ None ☒ As ordered below:
That the defendant has the ability to pay within that the amounts ordered herein. Should his/her financial condition change s/he shall forthwith petition this Court for reconsideration of such condition.

Mandatory ☒ Felony 3. (# counts) @ $30.00 Amount $150.00; Victim/Witness Surcharge ☐ Misdemeanor

_____. (# counts) @ $20.00
Amount_____: Sec. 973.045 Wis. Stats.)
Paid ☐ Yes Amount $_____; ☐ No.

IT IS FURTHER ORDERED that the defendant shall pay surcharges pursuant to Sec. 973.09(1)(b), Wis. Stats.:

IT IS ADJUDGED that 264 days sentence credit are due pursuant to Sec. 93.155, Wis. Stats.

IT IS ORDERED that the Clerk deliver a duplicate original of this Judgment to the Sheriff, and that the Sheriff shall forthwith deliver the defendant and a copy of this Judgment to the Dodge Correctional Institution (Reception Center) Located in the City of Waupun.

(affix seal)

BY ORDER OF THE COURT. Signature of Judge, Deputy or Clerk of Court. "s/"
Name of Judge Dennis J. Berry — Date Signed Feb. 22, 1990
Name of Defense Attorney R. Sfasciotti — Name of District Attorney L. Weber

2002 WI App. 56, *; 251 Wis. 2d 482
640 N.W. 2d 565; Wisc. App.LEXIS 54,**

State of Wisconsin, Plaintiff-Respondent, v.
Christopher L. Russell, Defendant-Appellant.

No. 01-1291-CR

COURT OF APPEALS OF WISCONSIN, DISTRICT THREE

2002 WI App 56; 251 Wis. 2d 482; 640 N/W. 2d 565;
2002 Wisc. App LEXIS 54

January 23, 2002 decided
January 23, 2002, Filed

NOTICE: PURSUANT TO RULE 809.32 OF APPELLATE PROCEDURE, AN UNPUBLISHED OPINION IS OF NO PRECEDENTIAL VALUE AND FOR THIS REASON MAY NOT BE CITED IN ANY COURT OF THIS STATE AS PRECEDENT OR AUTHORITY EXCEPT TO SUPPORT A CLAIM OF RES JUDICATA, COLLATERAL ESTOPPEL OR LAW OF THE CASE.

PRIOR HISTORY: [**1] APPEAL from a judgment and an order of the circuit court for Price County: DOUGLAS T. FOX, Judge. Cir. Ct. No. 00-CF-60.

DISPOSITION: Affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant pleaded no contest to marijuana possession, second offense, in exchange for the State recommending 18 months' probation and dismissal of the charge for possession of drug paraphernalia. The Circuit Court for Price County (Wisconsin) accepted the plea and sentence and denied defendant's motion for postconviction relief. Defendant appealed.

OVERVIEW: At his initial appearance, defendant entered his plea, and engaging defendant in a plea colloquy, the circuit court accepted the plea and recommendation of probation. It was undisputed that no preliminary hearing was held nor was an information filed. Defendant argued that the State's failure to file an information deprived the circuit court of subject matter jurisdiction. The appellate court ruled that because defendant did not contend that the complaint did not charge an offense known to law, the criminal subject matter jurisdiction attached upon the filling of the criminal complaint and continued until the case's final disposition. Furthermore, defendant knew the exact nature of the charge against him and insisted on entering a plea at his initial appearance. Under these circumstances, the circuit court properly concluded that the lack of an information was a mere defect of form that did not prejudice defendant and therefore did not invalidate the judgment.

OUTCOME: The judgment was affirmed.

CORE TERMS: matter jurisdiction, matter of form, preliminary hearing, failure to file, postconviction, deprived, waived, judgment of conviction, count of possession, present case, final disposition, distinguishable, jurisdictional, invalidate, objected, felony, attaches, pled, drug paraphernalia, appearance, marijuana, probation

LEXISNEXIS (R) HEADNOTES

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Criminal Law & Procedure > Postconviction Proceedings > Motions to Vacate Judgment

Criminal Law & Procedure > Appeals > Standards of Review > General Overview

HN1[↓] The question whether a circuit court lacks subject matter jurisdiction is a legal issue that the appellate court reviews independently.

Criminal Law & Procedure > Accusatory Instruments > Informations > General Overview

Criminal Law & Procedure > Preliminary Proceedings > Preliminary Hearings > Time Limitations

HN2[↓] See Wis. Stat. § 971.01 (1999-2000).

Civil Procedure > Jurisdiction > General Overview

Criminal Law & Procedure > Accusatory Instruments > Complaints > General Overview

Criminal Law & Procedure > Jurisdiction & Venue > Jurisdiction

HN3[↓] Criminal subject matter jurisdiction is the power of the court to inquire into the charge crime, to apply the applicable law and to declare the punishment. To that end, the circuit court's subject matter jurisdiction attaches upon the filling of the criminal complaint unless the complaint does not charge an offense known to law. Further, once criminal subject matter jurisdiction attaches, it continues until a final disposition of the case.

Criminal Law & Procedure > Accusatory Instruments > Indictments > General Overview > Criminal Law & Procedure > Accusatory Instruments > Informations > General Overview

HN4[↓] See Wis. Stat. § 971.26 (1999-2000).

JUDGES: Before Cane, C.J., Hoover, P.J., and Peterson, J.

OPINION

[*P1] PER CURIAM. Christopher Russell appeals a judgment convicting him of one count of possession of THC, second offense, contrary to Wis. Stat. § 961.41 (3g) (e).[1] He also appeals the order denying his motion for postconviction relief. Russell argues that because the State failed to file an information, the circuit court was deprived of subject matter jurisdiction to accept his plea, impose sentence or enter a judgment of conviction. We reject Russell's argument and affirm the judgment and order.

FOOTNOTES

[1]All referenced to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

Background

[*P2] On August 17, 2000, Russell was charged with one [**2] felony count of possession of marijuana as a second offense and one misdemeanor count of possession of drug paraphernalia. At his initial appearance, Russell pled no contest to the marijuana possession charge, second offense, in exchange for the State recommending eighteen months' probation and dismissal of the charge for possession of drug paraphernalia. After engaging Russell in a plea colloquy, the circuit court accepted his plea and, consisted with the States recommendation, sentenced him to eighteen months' probation. It is undisputed that no preliminary hearing was held nor was an information filed.

[*P3] Russell's subsequent motion to vacate the judgment of conviction and dismiss the case was denied. This appeal followed.

Analysis

A. Subject Matter Jurisdiction

[*P4] Russell argues that the State's failure to file an information deprived the circuit court of subject matter jurisdiction. HN1[↑] The question whether a

circuit court lacks subject matter jurisdiction is a legal issue that this court reviews independently. See *State v. Webster*, 196 Wis. 2d 308, 538 N.W. 2d 810 (Ct. App. 1995).

[*P5] Citing *State v. Woehrer*, 83 Wis. 2d 696, 266 N.W. 2d 366 (1978) [**3] and *State v. May*, 100 Wis. 2d 9, 301 N.W. 2d 458 (Ct. App. 1980), Russell argues that the filing of an information is a jurisdictional requirement in a felony case. Thus, he contends that failure to file an information deprived the court of subject matter jurisdiction. Although *May* and *Woehrer* appear to stand for the proposition that Wis. Stat. § 971.02 (2) mandates the filing of an information, the facts if these cases are distinguishable from the present case.[2]

FOOTNOTES

[2] Wisconsin Stat. § 971.01 provides, in relevant part, that HN2 "the information shall be filed with the clerk within 30 days after the completion of the preliminary examination or waiver thereof. ... Failure to file the information within such time shall entitle the defendant to have the action dismissed without prejudice."

[*P6] In *May*, the defendant moved to dismiss the charges against him because the information had not been served within thirty days [** 4] of the preliminary hearing. *May*, 100 Wis.2d at 10. Because the issue in *May* dealt with service, as opposed to filing of an information, the *May* court's observation

that "the filing of the information is a jurisdictional requirement" is mere dicta.

[*P7] Turning to *Woehrer*, the defendant there, as here, challenged his conviction on the basis of the State's failure to file on information. *Woehrer*, 83 Wis. 2d at 697. Unlike the present case, however, the *Woehrer* defendant pled not guilty and prior to his trial, objected to the lack of an information. The *Woehrer* court, in fact, noted: "There is no claim that the defendant waived such filing by pleading guilty or nolo contendere or by going to trial on the merits. On the contrary, the defendant properly objected to the failure to file the information." *Woehrer*, 83 Wis. 2d at 699. Thus, the *Woehrer* court seemingly contemplated the possibility that the filing of an information may be waived.

[*P8] In any event, this court has recognized that HN3↑"criminal subject ... matter jurisdiction is the 'power of the court to [**5] inquire into the charged crime, to apply the applicable law and to declare the punishment.'" *State v. Webster*, 196 Wis. 2d 308, 538 N.W. 2d 810 (Ct. App. 1995) (citing *State v. Aniton*, 183 Wis. 2d 125, 129, 515 N.W. 2d 302 (Ct. App 1994). To that end, the circuit court's subject matter jurisdiction attaches "upon the filing of the criminal complaint" unless the complaint does not charge an offense known to law. 196 Wis. 2d at 317. Further, "once criminal subject matter jurisdiction attaches, it continues until a final disposition of the case. " Id. Because Russell does not contend that the complaint in this case did not charge an offense known to law, we conclude that criminal subject matter jurisdiction

attached upon the filing of the criminal complaint and continued until the case's final disposition.

B. Defect in a Matter of Form

[*P9] Here, the circuit court, in denying Russell's motion for postconviction relief, concluded that the lack of an information was "a mere defect in a matter of form which clearly did not prejudice the defendant and, by operation of [Wis. Stat. § 971.26], does not invalidate [**6] the judgment."[3] Russell, citing *Woehrer*, 83 Wis.2d at 699, argues that "the lack of an information ? is not a matter of form." The *Woehrer* court's statement in full, however, provided: "The lack of an information *in this* case is not a matter of form. " Id. (Emphasis added.) Because the facts of *Woehrer* are distinguishable from the present case, Russell's argument is not persuasive. [4]

FOOTNOTES

[3] Wisconsin Stat. § 971.26 provides that HN4↓ no indictment, information, complaint or warrant shall be invalid nor shall the trial, judgment, or other proceedings be affected by reason of any defect or imperfection in matters of form which do not prejudice the defendant."

[4] Russell also argues that the circuit court erred by additionally concluding that the State was precluded from an information because Russell neither had a preliminary hearing nor waived the right to a preliminary hearing, see *State v. Strickland*, 27 Wis. 2d 623, 633, 135 N.W. 2d 295 (1965), it was not precluded from filing an information. In any event,

because the circuit court properly concluded that the lack of an information was a defect in a matter of form that did not prejudice Russell, we need not address the circuit court's alternate grounds for denying Russell's postconviction motion. *See Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W. 2d 559 (Ct. App. 1983) (only dispositive issues need be addressed).

[**7] [*P10] The circuit court found that Russell knew the exact nature of the charge against him and insisted on entering a plea at his initial appearance. Under these circumstances, the circuit court properly concluded that the lack of an information was a mere defect of form that did not prejudice Russell and therefore did not invalidate the judgment.

By the Court. - Judgment and order affirmed.

This opinion will not be published. *See* Wis. Stat. Rule 809.23 (1) (b)5.

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Get a Document by Citation 1993 Ohio App. LEXIS 5799

1993 Ohio App. LEXIS 5799,*

STATE OF OHIO, Plaintiff-Appelle v. BILLY RAY BISHOP, Defendant-Appellant

Case No. 3070

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, CLARK COUNTY

1993 Ohio App. LEXIS 5799

December 1993, Rendered

PRIOR HISTORY [*1] (T.C. Case No. 92-CR-3562).

DISPOSITION Reversed and Dismissed.

CASE SUMMARY:

PROCEDURAL POSTURE Defendant sought review of an order of a trial court (Ohio), which entered his conviction for criminal trespass upon his no-contest plea and placed him in a pre-trial probation program.

OVERVIEW: The complaint was unsigned by the complaint. Defendant's attorney moved to dismiss the complaint and the action on the grounds of an improperly executed affidavit and complaint. The

trial court overruled the motions, holding that defendant had waived the defects. The court ruled the court did not have subject matter jurisdiction of the action due to the lack of a signed complaint, and that the trial court erred in holding that the defect could be waived. The fling of a valid complaint was a necessary prerequisite to the trial courts acquiring jurisdiction. The complaint was required to be made upon oath before any person authorized by law to administer oaths pursuant to Ohio R. Crim. P. 3. Defendant could not have waived a defect that deprived the trial court of subject matter jurisdiction. The court reasoned that the absence of a criminal complaint could not have been waived by defendant's plea of no contest because any conviction resulting from an invalid complaint was a nullity.

OUTCOME: The court reversed the trial courts decision and dismissed the case.

LEXIS (R) HEAD NOTES

Criminal law & Procedure>Accusatory Instrument> Complaints>General Overview

HN1↓ The filing of a valid complaint is a necessary prerequisite to the courts acquiring jurisdiction. A complaint must be made upon oath and before any person authorized by law to administer oaths Ohio R. Crim. P. 3.

Civil Procedure>Jurisdiction>Subject Matter Jurisdiction> Jurisdiction Over Actions> General Overview

Criminal Law & Procedure>>Guilty Pleas>Waiver of Defenses

HN2↓ A defect that deprives a court of subject matter jurisdiction cannot be waived by a plea of no contest or even guilty, since any conviction resulting from a invalid complaint is a nullity.

COUNSEL: STEPHEN SCHUMAKER, S. Ct. Regis No. 14643, 50 E. Columbia St., Springfield, OH 45502, Attorney for the Plaintiff-Appelle.

SHAWN A THOMAS, S. Ct. Regis No. 40462, 30 E.. Ct. Regis No. 14643, 30 E. Columbia St., Springfield, OH 45502, OH 45502, Attorney for Defendant-Appellant.

JUDGES: FAIN J., GRADY P.J., and WOLFF, J.,

concur

OPINION BY: FAIN

OPINION

OPINION

FAIN, J.

Appellant Billy Ray Bishop Appeals from his conviction for criminal trespass.

We find that the trial court did not have subject matter jurisdiction due to the lack of a signed

complaint, and erred in holding that the defect could be waived.

I

Bishop entered a no-contest plea to a charge of Criminal Trespass on December 2, 1992, and was placed in a pre-trial probation program. On June 8, 1993, the trial court had found that Bishop had violated the terms of his probation. Bishop's attorney moved to dismiss the complaint and the action on the grounds of an improperly executed affidavit and complaint. The trial court overruled the motions, holding that Bishop had waived the defect, and sentenced Bishop to thirty days in jail, suspending twenty-five days for a six month term of probation.

[2*] From his conviction and sentence, Bishop appeals.

II

Bishop's sole assignment of error is as follows:

> THE TRIAL COURT WAS WITHOUT JURISDICTION TO MAKE A FINDING ON APPELLANTS NO CONTEST PLEA .

HN1↑ The filing of a valid complaint is a necessary prerequisite to a court's acquiring jurisdiction. *Columbus v. Jackson* (1952) 93 Ohio App. 516, 114 N.E.2d 60, A complaint must be "made upon oath

before any person authorized by law to administer oaths." Crim. R. 3.

Here, the complaint was unsigned by a complainant. As a result, we conclude that the trial court did not have subject matter jurisdiction, and Bishop could not be prosecuted.

We also conclude that HN3↑ a defect that deprives a court of subject matter jurisdiction cannot be waived by the accused. The absence of a criminal complaint cannot be waived by a plea of no contest or even guilty, since any conviction resulting from an invalid complaint is a nullity. *State v. Green* (1988), 48 Ohio App.3d 121, 548 N.E.2d 334.

Bishop's sole Assignment of Error is sustained.

III

Bishop's sole assignment of error having been sustained, the judgment of the trial court is *Reversed*, and this cause is hereby [3*] *Dismissed* for lack of subject matter jurisdiction.

. . . . . .

GRADY, P.J., and WOLFF, J. concur.

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 95-2304

RICARDO GLOVER,

Petitioner,

v.

GARY R. McCAUGHTRY, WARDEN,
WAUPUN CORRECTIONAL INSTITUTION,

Respondent.

AFFIDAVIT IN SUPPORT OF PETITION FOR THE COURT TO RESCIND ITS' ORIGINAL ORDER AND RECALL THE MANDATE THEREOF DENYING HABEAS § 2254 APPEAL BASE ON EXTRAORDINARY CIRCUMSTANCES AND IN THE INTEREST OF JUSTICE

I, Ricardo Glover, being first duly sworn on oath, deposes and says:

1. That I am the petitioner in the above-captioned, who makes this affidavit in support of his petition.

2. That I am presently in the custody of the Wisconsin Department of Corrections, and confined at the State Prison, Oshkosh Correctional Institution (OSCI), by Judy P. Smith, Warden.

3. That on May 29, 1989, at approximately 6:00 a.m., in the State of Wisconsin, Racine County, I was arrested by the Racine Police Department without a warrant and police placed me in their custody and did not release me from their custody.

4. That on the next day, May 30, 1989, I was forcefully brought before a Wisconsin criminal circuit court in chains and shackles by the Racine County District Attorney Office (prosecutor) in Racine County Case No. 89CF402 from the warrantless arrest and detention of my person by police that occurred on May 29, 1989, for a constitutional initial appearance hearing pursuant to the Fourteenth Amendment's due process clause and equal protection clause, and the Fourteenth Amendment's codifications, Wis. § § § 968.04(1)(a), 970.01(2) and 970.02(1)(a).

5. That at this initial appearance hearing held on May 30, 1989, the prosecutor did not file her written mandatory and jurisdiction accusatory instrument ("complaint," Wis. § 968.01(2)) against me charging me with a crime against the laws of the State of Wisconsin to invoke the criminal circuit

court's subject-matter jurisdiction jurisdictional powers to hear a criminal action against me pursuant to Wis. § 753.03, nor to invoke the criminal circuit court's personal jurisdictional powers over my person. The criminal circuit court lacked subject-matter jurisdictional power to adjudicate any action against me at the initial appearance held on May 30, 1989, because the prosecutor did not file her timely written mandatory and jurisdiction accusatory instrument [complaint] against me pursuant Wis. § § § 968.04(1)(a), 970.01(2) and 970.02(1)(a).

6. That at the initial appearance hearing held on May 30, 1989, my constitutional rights to due process of law, equal protection of the law, fundamental fairness and non-deprivation of my liberty pursuant to the Fourteenth Amendment were violated, along with my statutory rights, Wis. § § § 968.04(1)(a), 970.01(2) and 970.02(1)(a) were violated as well, when the criminal circuit court failed to dismiss the unconstitutional and unlawful proceeding (case) against me for lack of subject-matter jurisdiction and personal jurisdiction.

7. That on May 30, 1989, at the initial appearance hearing, no provision of the constitution or statute, or both, gave the criminal circuit court the jurisdictional powers to adjudicate a criminal or civil action against me, because the prosecutor did not file her written mandatory and jurisdictional accusatory instrument [complaint] identifying a charge against me that contained the essential facts constituting an offense charged, only a legislature can denounce crimes.

8. In addition to the Fourteenth Amendment's due process clause and equal protection clause, the Wisconsin Legislature placed safeguards in place for protecting my due process and equal protection rights, *see* Wis. § § § 968.04(1)(a), 970.01(2) and 970.02(1)(a), where I had been arrested and jailed on May 29, 1989, without a warrant and these safeguards are mandatory time limitations that state what shall occur, who shall perform them, when and when not.

9. On January 8, 1990, jury trial commenced, the prosecutor, an officer of the court, opening statements to the jury and all observers was that I was a "rapist" and I "raped" S.B. This was intentional misconduct by the prosecutor, because said prosecutor had no intention on proving such statements during the course of trial. Because, the prosecutor knew from her very own expert witness, Doctor John W. Linstoth, who testified at trial that he examined S.B. and found no evidence of "insult, tears, bruising, injuries, broken blood vessels" to S.B.'s "vaginal wall," and found "absolutely no evidence of any penetration whatsoever," thus from Dr. Linstoth's expert examination S.B. was a virgin. I beings a "rapist" and "raped" S.B. only existed through the prosecutor's intentional misconduct.

10. The prosecutor was aware of Dr. Brown's report that no rape occurred and that S.B. was "*injury free,*" and she failed to call Dr. Brown as a witness, when he was the first to examine S.B. In addition, the prosecutor was aware of Officer Cros' report which stated, "*that intercourse did not occur,*" and what the examination of the bedsheets revealed.

Once again, S.B. changes her stories now claiming that while she and I was in Kenosha, I asked for some "Vaseline" and placed the same on my penis and attempted to have intercourse with her and that very same "Vaseline" from my penis got on her vagina and buttock area from my attempts to have intercourse with her. The prosecutor's other expert witness, Forensic Chemist Michael Camp testified that he examined the vaginal and rectal swabs that came from S.B. and his examination revealed no such substances as "Vaseline" was detected on neither swab from S.B.

11. S.B. changed her story again, now claiming that she had taken a "bath" before being examined by doctors. The prosecutor's expert witness, Forensic Chemist Camp once again sets the record straight, he testified in his expert opinion if someone (let us say S.B.) had taken a "bath" before being examined by doctors that any seminal materials would disappear first and the "Vaseline" would disappear last from the skin or clothing. However, Dr. Linstoth testified that he found seminal material on S.B. and did not know how long they had been there. In addition testifying that S.B. was not afraid of me and she was injury free. That seminal material was not mine and the prosecutor's expert witness proved that.

12. My trial counsel immediately asked S.B. did she know "Steve", because none of the evidence pointed to me, and "one blonde head hair" was recovered and all parties knew the neither S.B. nor I had blonde hair.

13. The prosecutor realizing that I was innocent stopped the trial and offered me a plea; the prosecutor informed the circuit court judge that it would be easy for the jury to find me guilty of a lesser-included offense that Attempted First-Degree Intentional Homicide (a Class B Felony that carried a 20-year penalty). The prosecutor argued before the criminal circuit court judge for First-Degree Recklessly Endangering Safety (a Class D Felony that carried a 5-year penalty), the criminal circuit court judge stated no. My trial counsel informed the criminal circuit court judge that he had became "bias" against me.

14. The record shows that the criminal circuit court judge took over the role as prosecutor and I was afraid of him. The prosecutor's and the criminal circuit court judge got into a very hearted argument, the criminal circuit court judge stated loudly with thunder in his voice that: "This disturbs me greatly, to sit here and have to argue with the prosecution regarding what I perceive to be a lenient recommendation on their part." The reasons for the criminal circuit court judge's disagreement, he is not only participating in the plea discussions, but he was doing the plea-bargaining as well. The criminal circuit court judge with thunder in his voice stated that his "concern is the, the treatment of count two. Now as far as the total number of years."

15. The criminal circuit court judge was very interested in the outcome of the case. Me sitting in front of the criminal circuit court judge saw the facial expression of anger on his face and heard the thunder in his voice, I totally feared said judge. Troublesome

as these statements, expression and anger was to me, more troublesome still when the criminal circuit court judge heard direct evidence to support my innocence, but said judge ignored that evidence and gave a negative opinion on the merits of my case. The criminal circuit court judge with thunder in his voice stated to me sitting in front of him:

1) "*the evidence in my opinion is very strong*;" this meant to me that the judge was voicing that I was guilty instead of going on the evidence before him;

2) the State has "*presented a prima facie case thus far*," this meant to me that the judge heard evidence in my favor but totally ignored it;

3) "*yesterday I heard evidence, I heard the witness who at least from my prospective, was a very credible witness, who gave a very graphic description of what purportedly occurred*;" that meant to me that the judge had made up his mind that I was guilty not from the evidence presented but from a personal dislike of me; and,

4) "*at least in my opinion watching the victim her demeanor in the stand, I found her to be extremely credible witness very believable in her testimony presented herself as a very strong witness....*," this meant to me no matter what S.B. stated the judge would believe her, as everyone initially

believed each and every different statement she told.

16. The criminal circuit court judge was participating in the plea bargaining process and brought his force and majesty of his office to me, I was actually innocent of the crimes, but pled out of fear brought onto me by the criminal circuit court judge.

17. I saw the anger in the criminal circuit court judge's facial expression, heard the anger and thunder in said judge's voice, the judge's awesome power to impose a substantially longer or maximum sentence in excess of that proposed is whether referred to or not. I needed no reminder that if I rejects the proposal of the circuit court judge and continue to stand upon my rights to jury trial, but if I was convicted, I faced a significant longer sentence. Even when the trial was in progress, the criminal circuit court judge wanted me to plea, the criminal circuit court judge stated: "[f]irst of all, well, we'll just continue on here. It's my understanding that there still are negotiations that are in progress? Is that correct.?" There were no plea negotiation in progress, how could that be when all parties were in the middle of trial.

18. I did receive the maximum sentence by the criminal circuit court judge, in this case, I am actually innocent of the crimes and the record on its face demonstrates this as well, it is impossible for the alleged incident to have taken place at all. S.B.'s statements and testimony was incredible on its face,

but the circuit court judge forced me to plead out of fear.

19. My family members asked others for legal assistance regarding my case, and have received hundreds cases similar and on-point to my situation from organizations and law professors in other States.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated this 21st day of July, 2010.

Respectfully submitted,

"s/" _____.
Ricardo Glover, Affiant

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
Submitted July 30, 1997
Decided November 25, 1997[1]

Hon. KENNETH F. RIPPLE, *Circuit Judge*
Hon. ILANA DIAMOND ROVNER, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 95-2304

	) Appeal from the United
	) States District Court for
RICARDO GLOVER,	)the Eastern District of
Petitioner-Appellant,	) Wisconsin.
v.	) No. 95 C 425
GARY McCAUGHTRY,	) J.P. Stadtmueller,
Respondent-Appellate.	) *Chief Judge*

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[1] After an examination of the briefs and the record, we have concluded that oral argument is unnecessary; accordingly, the appeal is submitted on the briefs and the record. *See* Fed. R. App. P 34(a); Cir. R. 34(f).

The record in this case was lost after it was logged with this court. The court ordered that the record be reconstituted. *See* Fed. R. App. P. 10. Both parties, through counsel, participated in the reconstruction of the record. Neither has objected to the state of the reconstituted record on which the case is now submitted to the panel.

ORDER

I

INTRODUCTION

Petitioner Ricardo Glover, a Wisconsin state prisoner, filed a pro se petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, which the district court denied, finding no merit to any of the claims. On appeal, Glover contends that the district court erred in finding that his Fourth Amendment rights were not violated when police officers stopped the vehicle in which he was riding and then arrested him and erred in finding that his confession was not coerced. He contends, in the reply brief, that the state court had no subject matter jurisdiction to hear his case.[2] We affirm.

Glover was charged with first-degree sexual assault, false imprisonment with a dangerous weapon and attempted first-degree intentional homicide. In February 1990, a jury trial commenced. However, after the government closed its case in chief, Glover entered a plea of guilty to first-degree sexual assault, false imprisonment with a dangerous weapon, and a plea of no contest to the charge of attempted first-degree intentional homicide. A judgment of conviction was entered on February 22,

---

[2] The State of Wisconsin makes no claim that Glover's guilty plea waived these issues. See Lefkowitz v. Newsome, 420 U.S. 283 (1975); Tollett v. Henderson, 411 U.S. 258 (1973).

1990, and Glover was sentenced to 45 years' imprisonment.

On March 18, 1992, the Wisconsin Court of Appeals affirmed the conviction. *State v. Glover*, No. 91-0952-CR, 1992 WL 125183 (Wis. Ct. App. Mar. 18, 1992). Glover also filed a state petition for a writ of habeas corpus in the Wisconsin Court of appeals. The state appellate court struck the petition for non-compliance with Wisconsin's appellate rules.

On April 21, 1995, Glover filed a federal petition for habeas corpus, 28 U.S.C. § 2254 challenging the Wisconsin convictions, and raising eleven specific claims.[3] The district court dismissed the petition after concluding that none of the alleged grounds had merit. The court also held that Glover had exhausted his state remedies and had not defaulted on his claims.

III
DISCUSSION

Glover filed his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Under the holding in *Lindh v. Murphy*, 117 S. Ct. 2059, 2968 (1997) ("the new provisions of chapter 153 general apply only to cases filed after the Act because effective"), the amendments enacted as part of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) do

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[3] Only three of these claims have been raised on appeal.

not apply to Glover's case because the petition was pending at the time of the new Act. We therefore rely on the pre-AEDPA habeas corpus standards.

A. *Factual Background*

The facts, as stated by the Wisconsin Court of Appeals in the direct criminal appeal, are as follows:

> The charges against Glover stemmed from criminal acts committed by him on May 29, 1989 against his eleven-year-old sister-in-law, S.B. Testimony at the hearing on Glover's motions to suppress evidence indicated that on that day at approximately 3:18 a.m., Racine police officer Francis Vitacco was dispatched to a Racine residence where he met S.B., who *was soaking wet and being cared for by the occupants of the residence, These residents told Vitacco that S.B. had been wet when she came to their door and her hands had been tied behind her back. S.B. told Vitacco that her brother-in-law, Glover, had tied her hands together and thrown her from a bridge into a nearby river. S.B. told police that before throwing her into the river, Glover had sexually molested her at knifepoint.* Vitacco also discovered wet, child-sized footprints leading from the river.

Vitacco subsequently took S.B. to a hospital. S.B. provided police with Glover's name, his physical description, a description of what he was wearing , and a description of the vehicle he was driving at the

of the offenses, including its license number. At approximately 6:00 a.m., Vitacco was advised by his sergeant as to Glover's possible location. Vitacco and another officer drove to the address and discovered the vehicle identified by S.B. part in front. While the officers waited for backup assistance, the car began to move.

> Vitacco and his partner then stopped the vehicle and when they pulled it over observed three females in the front seat and a male matching S.B.'s description of Glover in the back seat. Vitacco then told Glover to step out of the vehicle and placed him under arrest. The car was immediately searched, leading to the seizure of a knife which was lying on the console by the shifting lever.

Glover, 1992 WL 125185, at ***1 (emphasis added).

In a federal habeas corpus proceeding, a state court's finding of the facts are presumed correct. 28 U.S.C. § 2254(d). Glover disputes the italicized portion of the state appellate court's statement of facts and insists that, at the time police first interviewed the victim, she had only accused Glover of pushing her off a bridge, an argument which we discuss further below. In any event, Glover concedes that "the facts surrounding [his] arrest are not disputed and, therefore, all that is presented here is the question of law as to whether those facts constituted a reasonable suspicion to stop [his] vehicle and whether was probable cause to arrest

him at the point he was arrested." Appellant's Br. at 10.

B. *Fourth Amendment Claims*

Glover argues that the trial court should have suppressed all evidence stemming from the stop of the automobile because the police did not have the necessary articulated and reasonable suspicion of wrongdoing. *See United States v. Hensley*, 469 U.S. 221, 229 (1985); *Terry v. Ohio*, 392 U.S. 1 (1968). Glover also argues that, even if the vehicle stop was appropriate, the police still had no probable cause to arrest him.

Under *Stone v. Powell*, 428 U.S. 465, 494 (1976), we cannot consider these Fourth Amendment claims in a federal habeas corpus proceeding unless Glover was denied a full and fair opportunity to litigate his claims in state court. Initially, we reject Glover's argument that the government has waived the argument that *Stone v. Powell* bars any review of the Fourth Amendment claims because it failed to refer to the *Stone* holding in the district court. The government was never required to file an Answer to the federal habeas corpus petition, and therefore it had no opportunity to refer to *Stone*. Glover himself, however, waited until his reply brief[4] to argue that

[4] Notably, at Glover's request, we appointed counsel and permitted the parties to re-brief the case. The *Stone v. Powell* issue was raised in the state's original appellate brief, but still ignored by Glover in his new, subsequently filed opening brief.

he had not received a full and fair opportunity to litigate his Fourth Amendment claims, which would generally result in a finding of waiver. *See Wildlife Express Corp. v. Carol Wright Sales, Inc.* 18 F.3d 502, 508 n.5 (7th Cir. 1994). Giving Glover the benefit of the doubt, however, in view of language in the opening brief that might be construed as an attempt to raise the full and fair opportunity claim, we shall consider the merits of the Fourth Amendment claims.

We hold that, even if Glover did not have a full and fair opportunity to litigate the claims based on the state appellate court's incorrect statement of facts present at the suppression hearing, *cf. Turentine v. Miller*, 80 F.3d 222, 224-26 (7th Cir.), *cert. denied*, 117 S.Ct. 394 (1996); *Weber v. Murphy*, 15 F.3d 691, 694 (7th Cir.), *cert. denied*, 511 U.S. 1097 (1994), the undisputed facts fully support a finding that the police had a reasonable and articulable suspicion to justify stopping the car in which Glover was riding, and had probable cause to arrest him.

Glover only offers a weak argument that the police had no reasonable suspicion to stop him. The victim knew Glover, her brother-in-law, and gave a full physical description of him, of the clothes he was wearing at the time of the alleged offense, and of his vehicle. When the police located the vehicle described by the victim, they observed Glover sitting in the back seat; he matched the physical description the victim had given. The main thrust of the argument Glover presents, however, is that at the time he was stopped and arrested, the police had no reason to

believe that anyone had committed a crime against the child. Glover argues that there was no testimony presented at the suppression hearing indicating that the police knew the victim had been sexually molested at knife point and then thrown into the river with her hands tied behind her. Glover's argument rests on the unlikely proposition that "one can imagine all sort of circumstances where" pushing a child off a bridge into a river "would not amount to criminal behavior," for example, "one could accidentally push another off a bridge." Appellant's Br. at 12-13. He maintains that the suppression hearing involved no testimony describing "what sort of bridge was involved" and thus it "could have been anything from a mile-long suspension bridge which runs 250 feet over the surface of the water, to a small wooden foot bridge running over a creek." Appellant's Br. at 12. He argues that the "ultimate legal question" is whether being "pushed off a bridge into water" is sufficient to warrant a belief that he "engaged in, or [was] about to engage in, criminal behavior." Appellant's Br. at 12.

The police reports, upon which the criminal complaint was based, expressly state that, prior to being brought to the hospital, the victim told the police that after sexually molesting her at knife point, Glover drove her to the bridge, tied her hands behind her back, and threw her into the river, a distance the police determined to be over 17 feet. Moreover, even the undisputed facts gave the police probable cause to arrest Glover. As Glover admits, the police knew that the victim claimed to have been pushed into the river in the middle of the night. Moreover, Glover concedes that the officer who first

interviewed the victim was told that he was sent to investigate a complaint of attempted homicide and sexual assault. The police were called shortly after the victim was able to get out of the river, and they saw child-sized footprints, still wet, leading up the river bank and across the bridge.[5] The victim identified Glover as the perpetrator. The police clearly had probable cause to believe a crime had been committed. We hold that the record fully supports the police officers' conduct in initially stopping the vehicle, and in giving them probable cause to arrest Glover.

C. *Voluntariness of Confession*

Glover argues that the Statement he made to the police following his arrest should have been suppressed because they were involuntary. He claims that the involuntariness resulted from the fact that either his signature on a form waiving his *Miranda* rights was forged, or his signed but did not understand what he was signing; that his request for an attorney was ignored; and various other factors, including "tactics" used by the police, and his fatigue, hunger, and intoxication at the time of questioning.

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[5] According to the police reports appended to his petition by Glover, the police immediately obtained the cloth which people living near the bridge had removed from the child's bound hands. The reports also recite that the child was soaking wet when the police first saw her.

Proof of coercive police conduct can support a finding that a confession was not voluntary. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). The ultimate issue of the voluntariness of a confession is a question of law which we review de novo. *Thompson v. Keohane*, 516 U.S. 99, 465-66 (1995); *Miller v. Fenton*, 474 U.S. 104, 115-17 (1985); *Cf. Ornelas v. United States*, 116 S.Ct. 1657, 1662 (1996); *United States v. Brooks*, 125 F.3d 484, (7th Cir. 1997); *United States v. Mills*, 122 F. 3d 346, 348-49 (7th Cir.), *petition for cert. filed*, ____ U.S.L.W. ____ (U.S. Nov. 5, 1997) (No. 97-6692); *United States v. D.F.*, 115 F 3d 413, 419 (7th Cir. 1997).

1. *Request for Attorney*

Glover argues, in the context of the coerced confession claim, that the statements should have been suppressed because during the interrogation he asked for an attorney when he remarked to the police, "I have no attorney."

Hearings were held on Glover's motions to suppress, and the trial courts found that Glover had been properly advised of his right to counsel, and then waived that right. The Wisconsin Court of Appeals held that the evidence taken at the hearings was sufficient to support the trial court's finding that Glover was informed of his right to counsel prior to questioning, and that he voluntarily and knowingly waived the right to counsel.

We agree with the district court that the statement "I have no attorney" was "ambiguous at

best," and that the police were not required to clarify, based on this statement alone, whether or not Glover was requesting an attorney. See *Davis v. United States*, 512 U.S. 452 (1994) (finding to be equivocal the Petitioner's statement, Maybe I should talk to a lawyer", but held that a suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney"). We also note the contradiction between Glover's argument that "had he known he had the right to speak to an attorney" he would have done so instead of giving statements to the police, and his argument that he asked for but was denied an attorney.

2. *Claim of a fabricated Miranda Form*

Glover argues that the confession should have been suppressed because the form purportedly bearing his signature and stating that *Miranda* rights had been given and understood was falsified by the police.

We conclude that there is no basis upon which to disturb the state courts' credibility determinations that Glover was read his *Miranda* rights, and that the signature on the form verifying this reading was in fact Glover's. See Henderson v. DeTella, 97 F.3d 942, 948 (7th Cir. 1996), cert. denied, 117 S. Ct. 1471 (1997). Moreover, we note that Glover's claim that the signature on the form was forged contradicts his statement that he did sign the form, but that, without his glasses, he could not read it. He states

that he "was under the understanding that he was signing a form for his clothing to be taken, not a waiver of rights form." Habeas Corpus Pet. At 5-a.

3. *Coerced Confession: Other Factors*

Glover also argues that his statements were coerced, for example, by the police telling him horrifying stories of "what they did to John Dillinger." In addition, he alleges that during the 3-1/2 hours of questioning, he was suffering from sleep deprivation; anxiety; hunger; a psychiatric disorder ("schizoid personality disorder"); intoxication; and poor vision; and that "he was a stutterer."

The state appellate court found that the evidence supported the trial courts [6] findings that no improper of coercive police conduct occurred, when the questioning occurred over a period of only 3 ½ hours, with periodic breaks, and the police officers testified that Glover seemed alert and gave coherent answers. The facts presented in this record strongly support the state courts' underlying factual determinations, and our de novo review leads us to conclude that no police coercion undermined the confession. The "horrifying story" about John Dillinger, if true, does not rise to the level of a due process violation. There is no evidence that the police knew, or should have known, of Glover's alleged psychiatric disorder. See *Bae v. Peters*, 950 F. 2d

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[6] Glover was initially charged in two different counties in Wisconsin, and thus two different trial courts heard the defense motions to suppress.

469, 475 (7th Cir. 1991). Nor did Glover appear to be intoxicated immediately before, during, or after the interview. See *United States v. Chrismon,* 965 F. 2d 1465, 1469 (7th Cir. 1992). In fact, Glover claims only that he had consumed "large amounts of alcohol...on the evening before the incident." The interview itself did not take place until 10:00 a.m. the next day; this interval further undermines his claim that he was still intoxicated at the time. In regard to Glover's repeated reliance on the fact that he stuttered, he points to nothing to indicate the import of stuttering; for example, he does not claim that the police misunderstood any portion of the statements he made. And, given the brief length of the mid-morning interview, Glover's complaint that he was "interrogated...over the course of three hours with nothing to eat" can hardly point to police coercion.

Finally, Glover argues that the police were "attempting to wear [him] down." He points to the detectives' testimony that, during the interview, they were trying to get him to "change" his story, that they took breaks to "discuss [their] strategy," and that different detectives interviewed him. These are normal police interviewing procedures that simply do not rise to the level of coercion.

We conclude, viewing the totality of circumstances, that Glover's claim that his confession was involuntary and resulted from police coercion is without merit.

D. *State Court's Jurisdiction*

Glover argues in his reply brief that the state court had no "subject matter jurisdiction" to hear his case because at the time he first appeared before the court, no charges had been filed, and charges were not filed until the day after his arrest. [7] An argument raised for the first time in a reply brief is waived. [8] *Wildlife Express Corp.*, 18 F. 3d at 508 n.5; 7th Cir. R. 28(f). In any event, we find no violation of Glover's due process rights. See *United States v. Smith*, 80 F.3d 1188 (7th Cir. 1996).

Conclusion

For the reasons stated, the judgment of the district court is affirmed.

AFFIRMED

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[7] The Wisconsin Court of Appeals held, the one-day delay for further investigation and the filing of a complaint was properly granted by the trial court, and did not constitute an unreasonable delay under Wisconsin law, citing Wis. Stat. §§ 970.01, 970.02.

[8] Glover's counsel notes in the reply brief that despite Circuit Rule 28(f), "Glover has forcefully demanded that counsel address the jurisdictional issue in this reply brief," Appellant's Reply Br. At 5, that he filed the opening brief before Glover had the opportunity to review it; and that this court subsequently denied Glover's attempt to file a supplemental pro se brief raising the issue.

United States District Court

EASTERN DISTRICT OF WISCONSIN

RICARDO GLOVER,
Petitioner, JUDGMENT IN A CIVIL CASE

GARY R. MCCAUGHTRY,
Respondent. CASE NUMBER:95-C-425

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came on for consideration before the Court and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Glover's petition for a writ of habeas corpus pursuant to 28 U.S.C. section 2254 be and the same is hereby DISMISSED;

IT IS FURTHER ORDERED that Glover's request for leave to proceed in forma pauperis be and the same is hereby DENIED as moot; and

IT IS FURTHER ORDERED that Glover's motion for appointment of counsel be and the same is hereby DENIED as moot.

1129

5/16/95 SOFRON B. NEDILSKY
Date Clerk

Copy mailed to attorneys "s/" .
For parties by the Court (By) Deputy Clerk
Pursuant to Fed. R. Civ. P. 77(d).

UNITED STATES CODES

Title 28, Section § 2244 (b) (1)- Finality of determination

A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

Title 28, section § 2254 (a) – State custody; remedies in Federal Courts.

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Amendment XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United states and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws.